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DISPOSITION OF BONUSES, RENTALS, AND ROYALTIES FROM UNALLOTTED INDIAN LANDS

JANUARY 19, 1925.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. HAYDEN, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 876]

The Committee on Indian Affairs, to whom was referred S. 876, to provide for the disposition of bonuses, rentals, and royalties received under the provisions of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, from unallotted lands in Executive order Indian reservations, and for other purposes, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

Page 2, after line 8, add the following:

That the provisions of said act, approved February 25, 1920, shall apply to unallotted lands within Indian reservations except that such lands may only be leased and patents shall not be issued for the same.

That the production of minerals on said lands may be taxed by the State wherein the same are produced in all respects the same as minerals produced on privately owned lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid from out of the tribal funds in the Treasury the tax so assessed: *Provided*, That such tax shall not become a lien or charge of any kind or character against the land or other property of such Indians.

SEC. 2. That there is hereby authorized an appropriation of $15,000 from the money on deposit in the Treasury to the credit of the Navajo Tribe of Indians derived from bonuses on oil and gas leases and from oil and gas royalties for expenditure, in the discretion of the Secretary of the Interior, for necessary expenses in connection with the supervision of the development and operation of the oil and gas industry on the Navajo Indian Reservation in Arizona and New Mexico.

The enactment of the bill as it passed the Senate was recommended in the following letter from the Secretary of the Interior:

DEPARTMENT OF THE INTERIOR,
Washington, December 6, 1923.

Hon. SELDEN P. SPENCER,
Chairman Committee on Indian Affairs,
United States Senate.

MY DEAR SENATOR SPENCER: The act of February 25, 1920 (41 Stat. L. 437), authorized the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

There were excluded from the provisions of the act "lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (36 Stat. 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided."

Prior to the passage of this act there was no provision of law whereby unallotted lands on Indian reservations created by Executive order might be leased for the purpose of mining the minerals named therein.

A number of applications for prospecting permits covering lands included within Indian reservations created by Executive order were filed with this department and my predecessor, Secretary Fall, ruled that the act applied to such reservations for the reason that the fee title to such lands was in the United States, the reservations being merely set aside for the use and occupancy of the Indians and might be restored by the President at any time to the public domain; also, that the act of February 25, 1920, in specifying the classes of public lands not subject thereto failed to mention Executive order Indian reservations. He therefore directed that applications for permits on such reservations be given consideration, but that any funds received from the leasing of the land be withheld pending legislation from Congress as to its disposal.

Congress has heretofore recognized the right of the Indians occupying Executive order Indian reservations to moneys arising from the leasing of their lands. Section 24 of the Indian appropriation act of May 18, 1916 (39 Stat. L. 123–155), authorized the leasing for mining purposes of unallotted lands on the diminished Spokane Indian Reservation, in Washington, and provided that he proceeds arising therefrom should be paid into the Spokane tribal fund

Section 26 of the act of June 30, 1919 (41 Stat. L. 3–31), authorized the leasing of unallotted lands on Indian reservations within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming for the purpose of mining metalliferous minerals and provided that the money arising therefrom "shall be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located." Many of the reservations affected by this act were created by Executive order.

By section 7 of the act of June 25, 1910 (36 Stat. L. 855–857), Congress recognized the right of the Indians of a reservation to the proceeds of timber cut from their unallotted lands, no distinction being made between reservations created by treaty or by Executive order.

Congress has repeatedly recognized the right of Indians living on Executive order Indian reservations to the proceeds of the sale of surplus land of such reservations. Such legislation has been enacted affecting Indian reservations in Arizona, California, Colorado, Idaho, Nevada, North Dakota, Oklahoma, Utah, and Washington.

Section 35 of the act of February 25, 1920, provides that the proceeds arising from leases shall be divided in certain proportions among the United States, the State in which the land is located, and the reclamation fund. None of the money arising under this act from leases on Executive order Indian reservations can therefore be used for the benefit of the Indians occupying the reservation.

To remedy this defect and to recognize the right of the Indians to the proceeds arising from their reservation lands, a draft of a bill has been prepared providing that the moneys arising from leases of Executive order Indian reservation lands under the act of February 25, 1920, shall be deposited in the Treasury to the credit of the tribe for whose benefit the reservation was created, such moneys to be subject to appropriation by Congress for expense of administration and for the use and benefit of the Indians.

It is recommended that early and favorable consideration be given to the bill.

Very truly yours,

HUBERT WORK, *Secretary.*

Shortly after the passage of the general leasing act of February 25, 1920, a bill was introduced in the House of Representatives applying the leasing provisions of that act to unallotted lands on Indian reservations, upon which the then Secretary of the Interior submitted the following report:

DEPARTMENT OF THE INTERIOR,
Washington, December 23, 1920.

MY DEAR MR. SNYDER: I am in receipt of your letter inclosing for report a copy of H. R. 13851, a bill to authorize mining for nonmetalliferous minerals on Indian reservations.

Authority was granted in section 3 of the act of February 28, 1891 (26 Stat. L. 795), for leasing lands within treaty Indian reservations, but there is no authority under existing law for leasing unallotted land on Indian reservations created by Executive order or legislative enactment for farming, grazing, mining, or business purposes, except under section 26 of the Indian appropriation act approved June 30, 1919, which authorizes the leasing of unallotted land on Indian reservations in several States for the purpose of mining metalliferous minerals.

It is reported that there are deposits of asbestos on the Apache Reservation in Arizona and that part of the Navajo Indian Reservation is underlain with coal. There have also been reports to the effect that on some of the reservations not subject to lease under existing authority there is oil and gas.

Many applications for leases on unallotted land on various reservations have been received from time to time, and I believe it would be to the advantage of both the Indians and the public generally to authorize the leasing of unallotted land on all Indian reservations. The resources of the reservations would be developed and the Indians would benefit by reason of royalties and rentals and thus need less financial aid from the Government.

In view of the fact that many requests are being received for leases on unallotted lands not subject to lease under existing authority it is hoped that early and favorable consideration will be given the proposed legislation by your committee and the Congress.

Cordially yours,

JOHN BARTON PAYNE, *Secretary.*

Hon. HOMER P. SNYDER,
Chairman Committee on Indian Affairs,
House of Representatives.

The proviso to section 3 of the act of Congress approved February 28, 1891 (26 Stat. L., p. 795), to which reference is made in the bill, is as follows:

That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council, speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

The second provision in the amendment recommended by your committee is based upon a proviso to section 26 of the Indian appropriation act approved March 3, 1921 (41 Stat. L., p. 1249), relating to the lands of the Quapaw Indians of Oklahoma, which is as follows:

And provided further, That the production of minerals on said lands may be taxed by the State of Oklahoma in all respects the same as that produced on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid from out of the individual Indian funds held under his supervision, belonging to the Indian owner of the land, the tax so assessed against the royalty interests of the respective Indian owner in such production: *Provided, however,* That such tax shall not become a lien or charge of any kind or character against the land or other property of said Indian owner.

Another precedent for the payment of a State tax on minerals produced on Indian lands is found in section 5 of the "Act to amend

section 3 of the act of Congress of June 28, 1906, entitled 'An act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes' " (41 Stat. L., p. 1250) which reads:

SEC. 5. That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Okla., and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per cent levied as gross production tax, to be distributed as provided by the laws of Oklahoma: * * *

The following letter from the Commissioner of Indian Affairs also refers to the taxation of oil, gas, and other minerals produced on Indian lands:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 29, 1924.

MY DEAR MR. HAYDEN: Receipt is acknowledged of your letter of January 28, 1924, referring to H. R. 2886 and asking to be advised as to the provisions of law relative to the taxation of oil and gas products on untaxed Indian lands in the State of Oklahoma; also, relative to the taxation of lead and zinc mines on the Quapaw Reservation.

The act of March 3, 1921 (41 Stat. L. 1249), extended until April 7, 1946, the reservation to the Osage Tribe of all minerals covered by their lands. Section 5 authorizes the State of Oklahoma to levy and collect a gross production tax upon all oil and gas produced in Osage County, Okla., "in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma," the Secretary of the Interior to pay to the State the proportion assessed against the Osage Tribe from the amount received as royalties on oil and gas.

The gross production tax in Oklahoma at present is 3 per cent. In addition to this amount the act provides for the payment to Osage County, Okla., of an additional 1 per cent of the amount received by the Osage Tribe as royalties to be used by the county for the purpose of building and maintaining roads and bridges therein.

Section 26 of the act of March 3, 1921 (41 Stat. L. 1225–1249), provides for continuing the restrictions against alienation for an additional period of 25 years covering certain Quapaw allotments, and makes the production of minerals on such lands subject to taxation by the State of Oklahoma the same as production on unrestricted lands, the Secretary of the Interior being authorized to pay such production tax from funds under his supervision belonging to the individual Indian owner of the land.

If it is considered advisable to provide for a production tax on minerals produced from Executive Order Indian Reservations to be paid to the State in which the land is located, it is suggested that the Secretary of the Interior be authorized and directed to pay such tax from the royalties on production paid in and covered into the Treasury to the credit of the Indians occupying the reservation.

Cordially yours,

CHAS. H. BURKE, *Commissioner.*

Hon. CARL HAYDEN,
House of Representatives.

Section 2 of the amendment to the bill is recommended by your committee in lieu of the bill S. 1653, which passed the Senate on December 30, 1924, and which reads as follows:

AN ACT Authorizing the expenditure for certain purposes of receipts from oil and gas on the Navajo Indian Reservation in Arizona and New Mexico

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any moneys derived from bonuses on oil and gas leases, and from oil and gas royalties, on the Navajo Indian Reservation

be, and they are hereby, made available for expenditure, in the discretion of the Secretary of the Interior, for necessary expenses in connection with the supervision of the development and operation of the oil and gas industry on said reservation and for the support, civilization, and education of the Navajo Indians in Arizona and New Mexico.

The following letters from the Secretary of the Interior and the Commissioner of Indian Affairs explain the necessity for this legislation:

DEPARTMENT OF THE INTERIOR,
Washington, December 17, 1923.

Hon. JOHN W. HARRELD,
Chairman Committee on Indian Affairs,
United States Senate.

MY DEAR MR. HARRELD: I have the honor to inclose herewith a draft of a bill authorizing the expenditure of receipts from oil and gas on the Navajo Indian Reservation for expenses incident to the supervision of oil and gas mining leases thereon, and for the civilization and education of the Navajo Indians. It is respectfully recommended that the proposed legislation receive the favorable consideration of your committee.

Recently oil has been discovered on the reservation in San Juan County, N. Mex., and on October 15, 1923, in accordance with regulations prescribed by this department, a public auction sale of oil and gas leases was held at Santa Fe, N. Mex., and as a result four tracts were sold as exploratory leases. These leases approximated collectively 16,000 acres. Leases on nine smaller tracts of about 640 acres each were also sold. There are yet thousands of acres which may be valuable for oil and gas on the reservation. No one knows at this time just how great an oil field may develop in the Navajo country, but the latest report from the field as to quantity and quality of oil discovered is highly encouraging.

Under the Indian appropriation act of March 3, 1883 (22 Stat. L. 582–590), the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation (except those of the Five Civilized Tribes), and not the result of the labor of any of such tribe, are covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe. Authority from Congress is necessary before the proceeds can be used for any purpose.

It is desired in the interests of the tribe to have the lands of the Navajo Indians developed for oil and gas mining purposes. Development work is just beginning and there are no funds available which may be used in leasing lands from time to time and in supervising development work as it proceeds. Since the Indians will benefit from any leases made and from any development, it is believed no more than fair and just that a part of the funds received from leases should be used in paying expenses of making and supervising them, the remainder to be used for the benefit of the Indians.

Very truly yours,

HUBERT WORK, *Secretary*

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Janury 26, 1924.

MY DEAR MR. HAYDEN: This acknowledges receipt of your letter of January 25, 1924, inclosing a copy of H. R. 4802, a bill authorizing the expenditure for certain purposes of receipts from oil and gas on the Navajo Indian Reservation in Arizona and New Mexico.

The proposed legislation is intended to provide for funds for the development of the oil situation on the treaty portion of the reservation.

On October 15, 1923, a public auction sale of leases was held, at which time approximately 21,500 acres were sold; and a bonus of $87,600 was realized, provided all the successful bidders complete their offers. However, of the 13 bids obtained, 6 leases have been approved, and a total of $72,100 in bonus money has been received. Only a small bonus was offered in connection with those leases, which are as yet incomplete, and as the successful bidders have been given until February 1, 1924, to complete their contracts it is not known at present whether all the entire bonus of $87,600 will be received.

Approximately $3,500 in advance royalty has been received; and in addition to the amounts shown above, $9,840 as advance rentals has been received by the superintendent of the San Juan (Navajo) Agency from the Midwest Refining Co., which has a lease, approved November 4, 1921, on 4,800 acres of treaty land. No royalty money has yet been received from these leases.

It will not be possible to say how much money will be needed for necessary expenses of supervision and development between now and June 30, 1925, but it is estimated that it will require at least $15,000.

There is now in charge of this work a commissioner to the Navajo Tribe, who has one clerk, and possibly an additional clerk will be required. Their salaries and the commissioner's traveling expenses, including automobile maintenance, his office, and office supplies must be provided.

The lands, or most of them, are unsurveyed, and it has been necessary so far to establish by protracted surveys the boundaries of the leases in order to locate them on the ground. It is also vitally important to have a geological survey of the reservation, or those portions at least where oil and gas are expected to be found.

The advertising and selling features of a public auction sale are to be considered. As you know, the reservation covers a large area, and travel and communication are difficult and expensive. Up to the present time the matter of proving the Navajo Reservation as an oil and gas bearing field is in the experimental stage, and no concrete figures can be given of the costs. The items above referred to are, however, cited as a basis for the estimate of $15,000 to cover the necessary expenses of the supervision of the development and operation of the oil and gas industry on the reservation during the next 17 months.

Cordially yours,

CHAS. H. BURKE,
Commissioner.

Hon. CARL HAYDEN,
House of Representatives.

As stated by the Secretary of the Interior in his report, dated December 6, 1923, on this bill, Albert B. Fall, the then Secretary, ruled that the general leasing act of February 25, 1920, applied to Indian reservations created by Executive order. Subsequently the present Secretary of the Interior asked the Attorney General for his opinion on the question whether such reservations are subject to that act. The opinion of the Attorney General is as follows:

DEPARTMENT OF JUSTICE,
Washington, May 27, 1924.

MY DEAR MR. SECRETARY: I have your letter of February 12 asking my opinion on the question whether Executive order Indian reservations are subject to the leasing act of February 25, 1920 (41 Stat. 437).

* * * * * * *

The opinion * * * which I now * * * give in response to your question of February 12, is as follows:

The general leasing act (41 Stat. 437) is entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." Its first section reads in part:

"That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (36 Stat. p. 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act * * *."

The title refers solely to the "public domain," and nowhere in the whole act is there any mention of Indians, Indian lands, or Indian reservations of any kind.

The long-settled rule of construction is that general laws providing for the disposition of public lands or the public domain do not apply to lands which have been set aside or reserved for particular public uses, unless the contrary clearly appears from the context or the circumstances attending the legislation. (Newhall *v.* Sanger, 92 U. S. 761; Bardon *v.* Northern Pac. R. R. Co., 145 U. S. 535, 538; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284; Union Pac. R. R. Co. *v.* Harris, 215 U. S. 386.) Concerning Indian reservations, Indian lands, and

Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto. (Missouri, Kansas & Texas Ry. Co. *v.* Roberts, 152 U. S. 114, 119.) This is true historically, and the fact is one of necessity, because Indians, and especially tribal Indians, remain a people apart for whom it is impracticable to legislate in terms common to them and the whites. (Ex parte Crow Dog, 109 U. S. 556, 571.)

Now, however, the Secretary of the Interior, explicitly reversing the attitude of his predecessors (47 L. D. 424, 437, 489), has decided that an act of Congress purporting to deal with lands of the public domain and a certain class of reservations owned exclusively by the United States is applicable to Executive order Indian reservations, although it contains no express or specific reference to Indians, Indian reservations, or Indian lands.

The first section of the Act describes the deposits and lands to which it applies. They are deposits and lands "owned by the United States". Then follow words of inclusion which make it clear that the act applies to the national forests of the West. This language in turn is followed by expressions of exclusion, and the reserves expressly excluded are Appalachian forest lands, national parks and lands reserved for military or naval uses.

It is obvious that the words of inclusion and the words of exclusion, taken together, do not by any means embrace all the lands "owned by the United States." Neither Indian reservations, national monuments, bird reservations, nor lighthouse reservations are either expressly included or excluded; and, of course, the United States is the sole owner of other bodies of land such as the Capitol Grounds at Washington, parks and squares in the District of Columbia, national cemeteries, etc., which are neither expressly included nor excluded.

Yet no one would contend that any of these latter lands are subject to the leasing act, whatever mineral deposits they may be found to contain. It is thus apparent that there are many classes of lands owned by the United States to which the leasing act does not apply although they are not expressly excepted from it. Nevertheless, the Secretary of the Interior and others who take the same view base their conclusions mainly upon the broad language "owned by the United States." But this language is not new in the legislation of Congress. The mineral law of May 10, 1872, now embodied in Revised Statutes, section 2319, provides for the disposition of "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed" * * *. The Supreme Court had occasion to consider this language in Oklahoma *v.* Texas (258 U. S 574). After quoting it, the court said (pp. 599, 600):

"This section is not as comprehensive as its words, separately considered, suggest. It is part of a chapter relating to mineral lands, which, in turn, is part of a title dealing with the survey and disposal of 'the public lands.' To be rightly understood, it must be read with due regard to the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course it has no application to the grounds about the Capitol in Washington or to the lands in the national cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the Western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply, and it never applies where the United States directs that the disposal be only under other laws."

The court accordingly held that the mining laws did not apply to certain lands "belonging to the United States" and lying in the south half of the bed of Red River.

The general mining laws never applied to Indian reservations, whether created by treaty, act of Congress, or Executive order. (Noonan *v.* Caledonia Min. Co., 121 U. S. 393; Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658; McFadden *v.* Mountain View M. & M. Co., 97 Fed. 670; Gibson *v.* Anderson, 131 Fed. 39.) Yet "owned by the United States" and "belonging to the United States" are equivalent expressions, and there seems to be no ground whatever for giving one a broader meaning than the other.

The foregoing considerations, I think, are conclusive. However, the leasing act contains a number of other provisions leading to the same result, two only of which will be mentioned. Section 28 declares that "rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe line purposes for the transportation of oil or gas." If the act were intended to provide for the leasing of Indian reservations, there would be the same need of rights of way for pipe lines through those reserves, but none are granted.

Again, the act, in section 35, provides in mandatory language for the disposition of all the royalty moneys realized. They are to be divided in certain proportions between the Treasury, the reclamation fund, and the States within which the leased lands lie. Yet, as hereafter shown, it would violate practically all legislative precedents for Congress to dispose of lands and mineral deposits in Indian reservations of any kind without directing the payment of some portion of the proceeds to the Indians. It is notable that Secretary Fall, in making his decision, realized this so strongly that, ignoring the mandatory directions of the act, he ordered the royalties from Executive order Indian reservations to be deposited in the Treasury in a special fund to await disposition by Congress.

In view of the foregoing, any reference to legislative history seems hardly necessary. Yet, in fact, none of the numerous committee reports made during the long pendency of the measure before Congress shows any indication whatever of an intent to embrace Indian reservations of any kind; but they do show affirmatively an understanding that the only lands to be affected were public lands, western forest reserves, and lands withdrawn by various Executive orders to protect the minerals therein pending congressional action for their final disposal. Thus, in the report of the conference committee dated February 11, 1919, occur the following significant statements (65th Cong., 3d sess., House Reports, vol. 2 H. R. 1059, p. 20):

"This bill makes possible the leasing, in whole or in part, of approximately 700,000,000 acres of public land, approximately 365,000,000 acres of forest reserve, 35,000,000 acres of coal land, 6,000,000 acres of oil land, and 3,500,000 acres of phosphate land. Under present law all of this land may be passed to patent, without Government regulation, without Government royalties, and without the receipt of any remuneration by the Government, excepting such purchase price as may be provided for the patenting of the same.

* * * * * * *

"This legislation is made necessary by certain withdrawals made by President Taft during his administration and later by President Wilson during his administration. Both Presidents Taft and Wilson and the Secretaries of the Interior under them have felt the necessity of passing this legislation."

I might stop here; but the reasons advanced by the Secretary, reinforced as they have been by arguments and briefs submitted to me in behalf of lessees or permittees now exploring Executive order reservations under this legislation, seem to require some comment. The gist of the argument is that the President could not reserve the minerals for the Indians; that they remained the property of the United States and were therefore "deposits" "owned by the United States" in the meaning of the leasing act.

That the President had authority at the date of the orders to withdraw public lands and set them apart for the benefit of the Indians, or for other public purposes, is now settled beyond the possibility of controversy. (United States *v.* Midwest Oil Co., 236 U. S. 459; Mason *v.* United States, 260 U. S. 545.) And aside from this, the general Indian allotment act of February 8, 1887 (24 Stat. 388, sec. 1), clearly recognizes and by necessary implication confirms Indian reservations "heretofore" or "hereafter" established by Executive orders.

Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reason, for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the general allotment act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of Executive order Indian reservations by excluding lands therefrom, and the question of his authority to do so has not apparently come before the courts.

When, by an Executive order, public lands are set aside, either as a new Indian reservation or an addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an "Indian reservation"; and so long, at least, as the order continues in force the Indians have the right of occupancy and use and the United States has the title in fee. (Spalding *v.* Chandler, 160 U. S. 394; In re Wilson, 140 U. S. 575.)

But a right of "occupancy" or "occupancy and use" in the Indians with the fee title in the sovereign (the Crown, the original States, the United States) is the same condition of title which has prevailed in this country from the beginning, except in a few instances like those of the Cherokees and Choctaws, who received patents for their new tribal lands on removing to the West. And the Indian right of occupancy is as sacred as the fee title of the sovereign.

The courts have applied this legal theory indiscriminately to lands subject to the original Indian occupancy, to reservations resulting from the cession by Indians of part of their original lands and the retention of the remainder, to reservations established in the West in exchange for lands in the East, and to reservations created by treaty, act of Congress, or Executive order, out of "public lands." The rights of the Indians were always those of occupancy and use and the fee was in the United States. (Johnson *v.* McIntosh, 8 Wheat. 543; Mitchell *v.* United States, 9 Pet. 711, 745; United States *v.* Cook, 19 Wall. 591; Leavenworth, etc., R. R. Co. *v.* United States, 92 U. S. 733, 742; Seneca Nation *v.* Christy, 162 U. S. 283, 288–289; Beecher *v.* Wetherby, 95 U. S. 517, 525; Minnesota *v.* Hitchcock, 185 U. S. 375, 388, et seq.; Lone Wolf *v.* Hitchcock, 187 U. S. 553; Jones *v.* Meehan, 175 U. S. 1; Spalding *v.* Chandler, 160 U. S. 394; McFadden *v.* Mountain View Min. & Mill. Co., 97 Fed. 670, 673; Gibson *v.* Anderson, 131 Fed. 39.)

In Spalding *v.* Chandler, supra, which involved an Executive order Indian reservation, the Supreme Court said (pp. 402, 403):

"It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this Government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

In McFadden *v.* Mountain View Min. & Mill. Co., supra, the Circuit Court of Appeals for the Ninth Circuit said (p. 673):

"On the 9th day of April, 1872, an Executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians, and for such other Indians as the Department of the Interior should see fit to locate thereon, a certain scope of country "bounded on the east and south by the Columbia River, on the west by the Okanagon River, and on the north by the British possessions," thereafter known as the "Colville Indian Reservation." There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that Executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes."

The latter decision was reversed by the Supreme Court and on an entirely different ground (180 U. S. 533). The views expressed in the McFadden case were reaffirmed by the same court in Gibson *v.* Anderson, supra, involving a reservation created by Executive order for the Spokane Indians.

The general Indian allotment act of February 8, 1887 (24 Stat. 388, sec. 1), is based upon the same legal theory as the decisions of the courts; for it is expressly made applicable to "any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use," etc.

If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of "occupancy and use" included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the general allotment act of 1887, which applies expressly to executive order reservations as well as to others. Then, beginning years ago, many special acts were passed (with or without previous agreements with the Indians concerned) whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the Government in surveying and selling the land. Legislation and treaties of this charac-

ter were dealt with in Frost *v.* Wente, 157 U. S. 46, 50; Minnesota *v.* Hitchcock, 185 U. S. 373; Lone Wolf *v.* Hitchcock, 187 U. S. 553; United States *v.* Blendaur, 128 Fed. 910, 913; Ash Sheep Co. *v.* United States, 252 U. S. 159.

Similar provisions have been made in many other cases for the sale of surplus tribal lands, all the proceeds of all elements of value to go to the tribe. In a recent act for further allotment of Crow Indian lands (41 Stat. 751), the minerals are reserved to the tribe instead of passing to the allottees (sec. 6); and moreover, unallotted lands chiefly valuable for the development of water power are reserved from allotment "for the benefit of the Crow Tribe of Indians" (sec. 10). The Federal water power act of June 10, 1920 (41 Stat. 1063), applies to tribal lands in Indian reservations of all kinds, but it provides (sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians," etc.

Again, by a provision in the Indian appropriation act of June 30, 1919, the Secretary of the Interior was authorized to lease, for the purpose "of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals," any part of the unallotted lands within "any Indian reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming" heretofore withdrawn from entry under the mining laws. These States contain numerous Executive order reservations, and yet the act declares that all the royalties accruing from such leases shall be paid to the United States "for the benefit of the Indians." (41 Stat. 3, 31–33.)

The opening to entry by Congress of a part of the Colville Reservation established in Washington by Executive order has been cited as an exception to this line of precedents. (Act July 1, 1892, 27 Stat. 62.) But the exception is more apparent than real; for Congress, though it expressly declined to recognize affirmatively any right in the Indians "to any part" of that reservation (sec. 8), yet, in fact, preserved the right of allotment, required the entrymen to pay for the lands, and set aside the proceeds for the benefit of the Indians for an indefinite period. Later, the proceeds of timber sales from the former reservation lands were secured to the Indians, but the mineral lands were subjected to the mineral laws without any express direction for the disposal of the proceeds, if any. (Act July 1, 1898, 30 Stat. 571, 593.) The committee reports show that the reservation was considered as improvidently made, excessive in area, and that the action taken was really for the best interests of the Indians. (S. Rept. No. 664, 52d Cong., 1st sess., vol. 3; H. Rept. No. 1033, 52d Cong., 1st sess., vol. 4.)

In respect to legislation and treaties of this character two views are possible: First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and laten resources, merely gives them its own property as an act of grace. Second, that the Indian possession extended to all elements of value in or connected with their lands, and the Government, in securing those values to the Indians, recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. (Lone Wolf *v.* Hitchcock, 187 U. S. 553.) Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from Beecher *v.* Wetherby, 95 U. S. 517, 525, as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the Indians; that occupancy could only be interfered with or determined by the United States."

If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In Worcester *v.* Georgia, 6 Pet. 515, 543, 544, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right as against each other, which he defines as "the exclusive right of purchasing such lands as the natives were willing to sell." As late as 1872 the Supreme Court said:

"Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the sign * * * to prohibit the sale of the land to any other governments or their subjects." (Holden *v.* Joy, 17 Wall. 211, 244.)

The important matter here, however, is that neither the courts nor Congress have made any distinction as to the character or extent of the Indian rights, as between Executive order-reservations and reservations established by treaty or act of Congress. So that if the general leasing act applies to one class, there seems to be no ground for holding that it does not apply to the others.

You are therefore advised that the leasing act of 1920 does not apply to Executive order Indian reservations.

Respectfully,

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